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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 518

ROBERT E. DINEEN, SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK, AS LIQUIDATOR OF NEW YORK
INDEMNITY COMPANY,

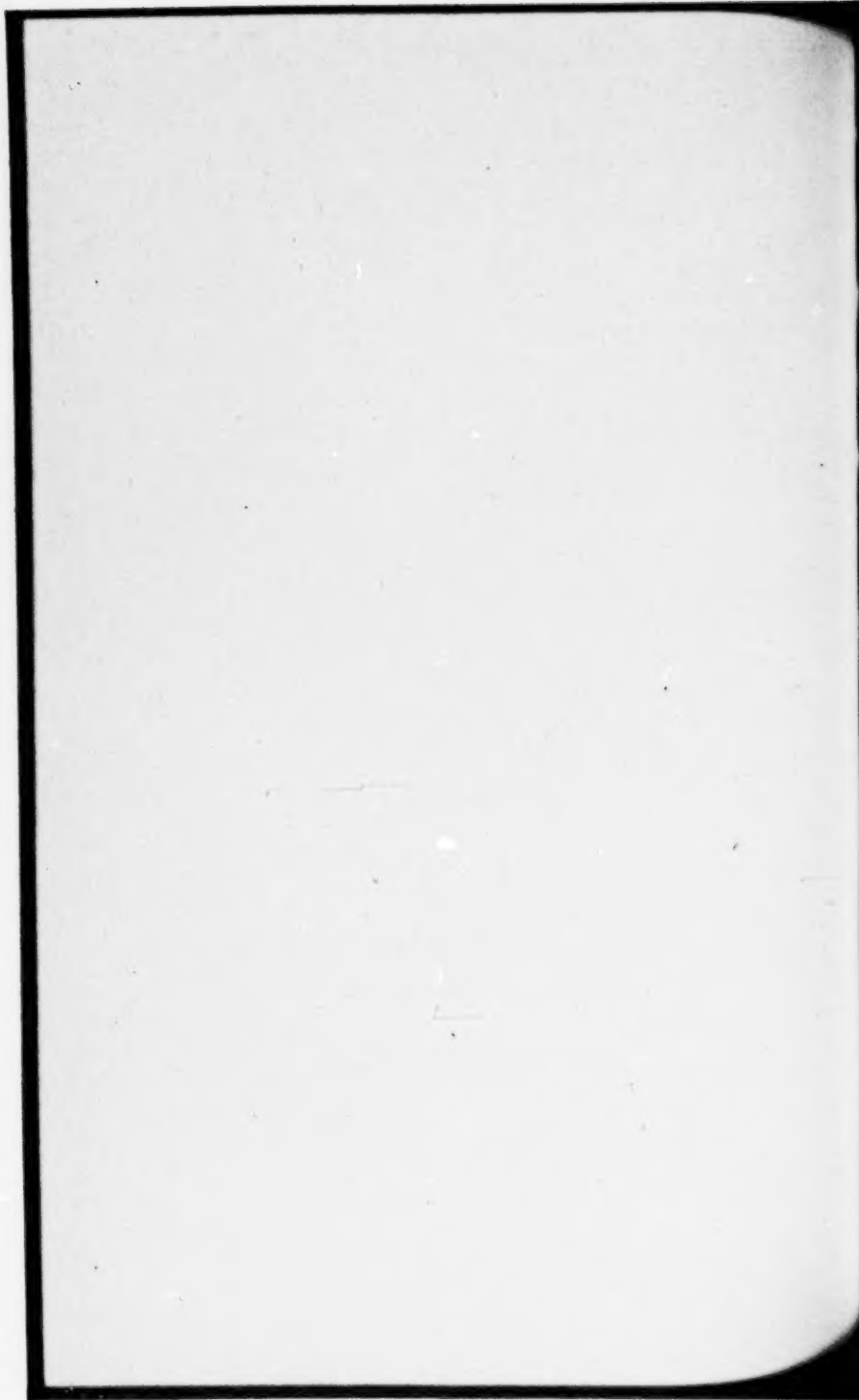
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

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vs.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

The petitioner, Robert E. Dineen, Superintendent of Insurance of the State of New York, as Liquidator of New York Indemnity Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above entitled case.

Opinions Below

The opinion of the Court of Claims and the findings of fact appear at R. 9-24 and are reported in — Ct. Cls. —, — F. (2) —.

Jurisdiction

The judgment of the Court of Claims was entered June 2, 1947 (R. 24). Motions for new trial filed on August 1, 1947 (R. 24) were denied on October 6, 1947 (R. 25). Jurisdiction herein is invoked pursuant to Section 3, Chapter 229, of the Act of February 13, 1925, 43 St. 939; 28 U. S. C. A. 288.

Questions Presented

The questions presented are whether the contractors remain liable for liquidated damages when it appears

Under Article 3: (a) the government changed the scope of the work from the construction within 150 days of certain work as the useful part or link of a highway system into a construction with no beginning or end, and thereby isolated and useless because of acts of the government in not providing the construction of additional necessary links of the highway, thus removing all circumstances relative to damages.

(b) in the beginning of the timely diligent performance of their right to proceed required of the contractors subject to summary government termination if same did not insure or obtain due completion, the government participated for 60 days, or 40% of the contract time, in and consented to total failure of contractor diligence or performance by not affirmatively terminating the contract, and, instead, by reminding the contractors of their liability for liquidated damages under Article 9 for delay and urging them to proceed for that reason.

Under Article 16: the government within the 150 days voluntarily defaulted in its liability to pay due monthly progress estimates, thereby terminating the contract by the resulting creation of the right of election in the contractors either to abandon further performance or to proceed upon

their own resources relieved of all liquidated damages as provided in Article 9 and subject only to the duty to perform in a reasonable time, and else to respond in actual damages.

Under Article 9: (a) Whether the delays, involved in the initial 60 days of non-diligence acquiesced in by the government, in the 31 days of performance in October affected by the admitted non-payment of due monthly estimates, and in the 13 days of favorable weather conditions admittedly unavailable for performance because of the stop order and refusal to pay estimates, a total of 104 days constitute substantial delays by acts of the government excusable under Article 9.

(b) Whether the refusal to pay monthly estimates as a breach of Article 16 terminated the contract to the extent of the liability for liquidated damages.

(c) Whether the elimination of the timely element of performance and the final lack of timely or any use for the completed work, or either, as creating no damages for untimely completion, relieved of the liquidated damages.

(d) Whether the \$9,300 assessment is penal under the facts of the case.

Under each Article:

Whether the decision below upholding the original contract and assessed liquidated damages conflicts with settled precedents.

The Contract Provisions

These, being Articles 3, 9 and 16 to the extent material, are excerpted from the Exhibit contract and set forth in annexed appendix.

Statement

The material facts stipulated by the parties and incorporated in findings of the Court below, are not in dispute.

In 1928, the Interior Department, relying upon large available appropriations, contracted for numerous improvements in the several National Parks to be completed in designated periods of time so as to fit into the projected pattern of the park development. The contract herein with the contractors and surety, for work in the California Sequoia National Park, is similar to contracts in other parks (1) and was the grading of a portion of a park highway system for a contract price of \$91,365.88 within 150 calendar days computed as between May 21 to October 18, 1928 and subject, so far as is here material to provisions of Articles 3, 9 and 16 of the Standard Government Contract respectively (3) authorizing the contract officer to make changes in drawings and specifications or the scope thereof, (9) authorizing the government, if the contractors fail or refuse to proceed with diligence necessary to insure its completion in the contract time, or any extension, or fail so to complete the work, to terminate the contractor right to proceed, and to complete the contract with the contractor equipment, or otherwise, at the expense of the contractors and surety, and if the government does not terminate the right of the contractor to proceed the contractors shall continue the work in which event actual damages for the delay will be impossible to determine, and, instead, the contractor shall pay an agreed sum (\$100 a day herein) as liquidated damages for each calendar day of delay until completion or acceptance of the work, provided that the right to proceed shall not be terminated nor liquidated damages charged because of unforeseeable delays including but not restricted to unusually severe weather, acts of the government, etc., and (16) that the government shall make partial payments to the contractors as the contract progresses at the end of each calendar month, or as soon thereafter as practicable on estimates made and approved by the contracting officer, subject to

retention of 10% of the estimate until final completion and acceptance.

By changes in its scope, under Article 3, the government reduced the contract price to ~~\$43,483.36~~ ^{\$47,882.52} and by reason of the situations hereafter stated, the contractors did not complete the work until August 20, 1929, whereupon the government assessed and collected \$9,300 from the final payment of \$12,694.42, as liquidated damages accrued in alleged 93 calendar days of unexcused contractor delay. The net loss to the surety is stated, in the petition (R. 5), as \$139,591.63, and, in Finding 19, as in excess of \$9,300.

Pursuant to Special Law 226 (101 Ct. Cls. XIX) conferring jurisdiction upon the Court below to hear, determine and render judgment upon the claim for remission of said liquidated damages, as presented by plaintiff as statutory liquidator of the insolvent surety, the action therefor was instituted below, duly heard and the petition ordered dismissed.

The petition below, original (R. 1-6) and Amended (R. 6-8) sought remission upon the grounds, First, that non-completion within the ~~120~~ ¹⁵⁰ days resulted in no damage to the government, and completion thereafter caused no damage and was without liability for liquidated damages, and, Second, that breach of the contract by the government terminated all liability for liquidated damages as provided in Article 9.

The government for defense sought to confine the performance to the contract to the original 150 days, with no extension of time, involving only a nominal breach in the refusal to pay the progress estimates, and so subject to liquidated damages for each unexercised calendar day of delay. The conclusion of the opinion below (R. 23-4) was that the government, probably entitled to terminate the contract because of the contractors tardiness in perform-

ance, did not terminate the contract by failing to make due monthly progress payments and by its shut down order, but only issued a suspension order, after which the contractors resumed and finished the work, so that the contract, including the liquidated damage provision remained in effect. In so deciding the opinion distinguishes *United States v. American Surety Company*, 322 U. S. 96, 88 L. Ed. 1158, as not applicable because therein the government actually terminated the contract. The opinion does not pass on the delays permitted or created by the government, and refused to consider the alleged penalty aspect of the \$9,300 in reference to the \$47,882.52 final contract price on the ground that whether or how much the government was damaged was unknown.

Preliminary to the opinion conclusion the Court below made findings of fact as follows:

From Finding 14—The contract when completed provided a piece of road of no useful value in a highway system until or unless the government thereafter made it viable at its one end by erecting three bridges and at the other by installing 29 miles of additional road demonstrating the government delay in filling in the highway pattern with other improvements made timely completion immaterial and divested untimely completion of every aspect of damages whether actual or undeterminable.

From Finding 6—Between May 21st and July 21st, during 60 days, or 40%, of the contract time, the government took no steps to terminate the right to proceed while the contractors entirely failed to proceed with any performance, and instead—“*the defendant's officers in charge of the project urged the contractors to proceed and called their attention to the contract provision relative to liquidated damages.*” (Quoted from Finding, R. 12)—demonstrating delay amounting to waiver of timely performance or breach terminating the contract.

From Finding 10—The progress estimate due and payable for September under Article 16, was \$4,980.43 and subsequently for October was \$18,971.93 exclusive of alleged damages.

From Finding 8—The appropriations were so exhausted on October 1st that the Interior Department was obliged to shut down all work unless contractors were willing to elect to proceed thereafter upon their own resources, whereupon the District Engineer so advised the contractors, offering to make prompt progress vouchers for bank discount by them and concluding—*“Wire at once whether you prefer continue construction or wish me to issue shut down order.”* The qualified reply was: *“We will attempt to go ahead and finance the above jobs as long as we can raise funds to do so. In the event it should develop that we cannot ourselves finance the same, we will at once ask you to issue shut down order”*. After performing to the extent of their resources through October, the contractors advised on October 30: *“We are no longer able to finance—unless we can at once receive from the government all payments due in accordance with the terms of our contracts”* * * * and received reply: *“In view of the fact you can no longer provide the necessary finances, you are hereby authorized to suspend operations—this is to be effective November 1, 1928.”* (Quotations from Finding, R. 13-4.)

From Finding 12—Of the stop order, the District Engineer advised the contractors on December 7: *“This authority to suspend operations is to be classed as a delay due to an act of the government as mentioned in Article 9 of the contract”*. (Quotations from Finding, R. 15.)

Parenthetically, the stop order of November 1 thus renders Finding 20 (R. 21) immaterial that—*“weather conditions would have permitted them (the contractors) to work up to November 13, 1928, when the weather would have re-*

quired a stoppage of all work for the winter season; also, in the aspect of delay, the government waiving any diligence in the first 60 days and not paying estimates in the 31 days of October contradict Finding 21 (R. 21) that—“*The contractors’ delay from the commencement of the work to the completion date, October 18, was attributable to themselves. (Quotations from Findings).*”

Parenthetically further, the Court below, while thus placing all delays entirely against the contractors, makes Finding 20 (R. 21) that, on October 31st measured by the \$91,000 contract the contractors had completed only 37%, but measured by the final \$48,000 contract had completed 71%, and then, nevertheless, states in the opinion (R. 23) only 37% of the contract was completed—“*though their contract time had already expired on October 18.*”

From Finding 12—The government ignored the contractor requests of December 10: “*that the contract be terminated—the contractors be paid the unit price on account of all work performed to date of the shut-down order, with a definite understanding that the contractors were not required to return and complete the work.*” (Quoted from Finding, R. 16.)

From Findings 14-18—In March and April, 1929, the contractors advised they were returning to complete the work, and asked a 120-day extension of time, pointing out their completed work would be useless pending government construction of ~~their~~ bridges at one end and 29 miles of road at the other end (R. 17-18), by replying they were notified to resume work June 1, including the statement: *Your contract time will be resumed as of that date.* (Quoted from Finding, R. 18.)

The contract was completed August 20, 1929 (R. 18) with a total elapsed time of 456 days, of which 212 days as involving severe winter weather, and one day for other reasons were excused, and the elapsed contract days were so

reduced to 243 days (R. 19-20), showing an alleged delay of 93 days beyond the contract time, with deduction of \$9,300 as liquidated damages which was ~~returned~~ from the final payment of \$12,694.42 made to the contractors. *retain return*

Specifications of Error to Be Urged

The Court of Claims erred:

1. *As to the delays permitted or provoked by the Government affecting timely performance or being breaches of the contract.*

(a) By ignoring the government acquiescence in entire lack of diligence or performance by the contractors in the first 60 days of contract time, being delay of the government contrary to the contract intent.

(b) By ignoring delay to the contractors by the government acts in refusing in and until expiration of the contract time to pay the due progress estimates, conceded by the offer of vouchers for discount to be essentials of timely performance, being delay in the 31 days of October.

(c) In disregarding and creating conflict of decision with settled precedents that delays have the aspect of termination, and, further, if attributable to both parties relieve of liquidated damage liabilities.

2. *As to termination of the contractor right to proceed by government breach of the contract:*

In holding the government default in not paying due progress estimates did not breach and terminate the contract so as to relieve of liquidated damages as provided in Article 9:

(a) By ruling the government escaped such default by imposing upon the contractors the choice to proceed upon their own resources.

(b) By ruling the stop order was a suspension of the original contract instead of the substituted qualified contractor election to proceed upon and only to the extent of their own resources.

(c) In disregarding and creating conflict of decision with settled precedents that default in payment of progress estimates effectively breaches the contract and terminates any liquidated damage liability and that the election of the contractors to proceed despite such default upon their own resources substitutes the liability, if any, only for actual damages.

3. *As to the penal effect of the liquidated damages.*

In avoiding decision thereof by disclaimer of knowledge —“*whether the government was damaged by the delay, nor, if so, how much*” (quoted from opinion R. 24) notwithstanding Finding 6 shows toleration of 60 days initial delay, Finding 8 shows creation of 31 days of delay and Finding 13 shows completion represented a useless stretch of highway with neither a beginning or an end and affording no basis for damages for its non-completion under any circumstances.

Reasons for Granting the Writ

1. The instant case involves no large amount but, unless corrected, its principles promote confusion and conflict in the administration of the provisions of government contracts. The controversy turns upon the second Paragraph of Article 9 as lately interpreted in *United States v. American Surety Company*, 322 U. S. 96, 88, L. Ed. 1158, wherein it appeared the government extended the time of a contract, and thereafter terminated the contract for lack of diligent performance when the work was unfinished for thirteen months and wherein its claim for liquidated damages alleg-

edly accrued during the thirteen months was denied by this court, saying:

That right (to liquidated damages under the second part of Article 9) is conditioned upon the government not terminating the contractor's right to proceed. Where there is such termination . . . the right to liquidated damages disappears.

Article 9 makes the government right to liquidated damages precisely dependent upon the stated condition precedent—"If the government does not terminate the right of the contractor to proceed"—which condition, the opinion holds, cannot be construed into a continuing condition although it enables the contractor to escape the imposition of liquidated damages by voluntary abandonment or by provoking government termination or although, as said in the opinion:

The government contracting officers in turn would be induced to allow the contractor to proceed to completion despite unexcusable delays so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.

Such action by the contracting officers precluding timely performance will not find approval anywhere when plainly apparent because, by defeating the objective of timely completion, it dissipates the existence of any damages as the result of untimely completion, and thus destroys the consideration that originally supported the provision for liquidated damage.

Yet this case baldly and plainly presents the government officers allowing the contractors to fail or refuse performance until 60 days or 40 per cent of the contract time had elapsed before they began performance. It is admitted, in such interval instead of termination, "*the defendants*

officers in charge of the project urged the contractors to proceed and called to their attention the contract provision for liquidated damages" (Finding 6, R. 12).

The decision below standing as final will approve official action that allows inexcusable delays and precludes prompt completion in the effort to obtain liquidated damages. The contractors should stand excused of the 60 days as delays, as "*due to unforeseeable causes*" and "*without the fault or negligence of the contractor*", since it cannot be presumed the government officers would so subvert and undermine the purpose of the contract.

Such 60 days of procrastination in delay become a breach for Green, J., in *Carroll v. United States*, 67 Ct. Cls. 513, 518, plainly states the difference:

The true principle is that the acts of the government or its omissions to act, even though they caused delay, will not make the government liable in damages unless they constitute also a breach of the contract express or implied.

It is submitted consideration hereof in further amplification of the *American Surety* opinion is just and proper.

2. The opinion below distinguishes the present case from *American Surety* on the ground that herein there was no termination by the refusal to pay the progress estimates since the contractors were invited and chose to proceed with performance upon their own resources. This conflicts with settled decisions by its disregard of the rights created by the refusal to pay the progress payments. In the sister cases of *Schuler and McDonald v. United States*, 85 Ct. Cls. 631, and *Joplin v. United States*, 89 Ct. Cls. 345, the contractors were performing similar contracts in other National Parks and on October 1st were notified the government was defaulting upon its progress payments. Each contract provided \$25.00 a day as liquidated damages. Each

contractor proceeded on his own resources, subsequently received stop orders effective November 7th and October 15th, and subsequently resumed under extensions of time and incurred liquidated damages in such extensions. Each subsequently collected damages for the breach of contract created by the government default as to due progress payments. Cf. *Myerle v. United States*, 33 Ct. Cls. 1, 25, and decisions therein cited; also *Suburban Contracting Co. v. United States*, 76 Ct. Cls. 533, 545, and *Commercial Casualty Co. v. United States*, 83 Ct. Cls. 376, in which the refusal to pay estimates is declared a breach that eliminates the item of liquidated damages.

The decision below conflicts with decision in holding after the admitted default and breach the contractors continued the contract fully in effect by choosing to proceed upon their own resources at the government invitation.

The situation is otherwise, *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341, decides:

Where plaintiffs had partly performed, and the defendant failed to do its corresponding duty under the contract, and defaulted on a payment due, they are not required to go on at the hazard of a further loss.

Re *Walker M. & A. Co.*, 32 F. (2) 825, 827, concisely states the resulting situation:

"Where one party to a contract fails to perform a condition which justifies the other party in refusing to perform, and yet the other party does not expressly abandon or repudiate the contract, the latter has a choice of two courses—to go on with the contract, or to stop performance. If he chooses one, he loses the right to the other. The two are inconsistent, and he may not maintain both.

"Election involves no requirement of mutual assent. It is the privilege of the injured party alone * * *. But if the election has once been made, the contract

must be completed unless there has been an additional breach by the other party."

The fact is the contractors chose to proceed only qualifiedly subject to the exhaustion of their available resources and the government agreed and gave the stop order when their resources were exhausted. The stop order terminated the limited performance of the contractors with their own resources. As the breach and termination put the liquidated damage obligation out of the contract, consequently, the government, by reliance on the subsequent relations, cannot nominalize the breach unless therefrom there appears actual agreement for reinstatement of the liquidated damage obligation. It cannot be implied for as held in *Tobin v. United States*, 103 Ct. Cls. 480:

If we give any head at all to the idea that its provision for liquidated damages should be narrowly construed, we should hold, as we do, that there was no agreement for liquidated damages in the situation which occurred.

3. The case below has no definite basis to support liquidated damages and hence same are submitted penal in effect.

The sum of \$100 a day was applicable to a \$91,000 contract in the beginning and in the end to a \$48,000 contract, and yet was fixed at \$25 a day in the similar Schuler contract and also in the Joplin contract for \$306,000.

Any original conception of the propriety of liquidated damages disappeared in the subsequent 60-day initial and subsequent 31- and 13- day delays consented to and created by the government and in the evident uselessness of the contract work when completed.

In these aspects *Schmoll v. United States*, 91 Ct. Cls. 1, 28, is submitted decisive:

"In several cases we have held where delays are caused by both parties to the contract the court will not

attempt to apportion them, but will simply hold the provision of the contract with reference to liquidated damages will be annulled.

.

“Penalties are not favored by the courts, when as in the case before us, it does not appear that any actual damages have been sustained. They are ‘enforced only after the demandant therefor has shown that he himself has strictly complied on his part with all the contract requirements prerequisite to such enforcement.’ *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 874. In *United States v. United Engineering Co.*, 234 U. S. 236, 242, it was held that:

“ . . . when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages . . . for each day’s delay . . . the other party must not prevent the performance of the contract within the stipulated time.

“and in such a case, though the completion of the work is delayed by the fault of the contractor, liquidated damages are waived.”

Turning to the penal aspect alone, *Wise v. United States*, 249 U. S. 361, 365, states the applicable rule:

“ . . . that in such cases courts will endeavor by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum, or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects.”

Upon application of the above rule, the reaction to the present situation, that tends to capitalize *damnum absque injuria*, is submitted to be as held in *Kothe v. Taylor Trust*, 280 U. S. 224, 74 L. Ed. 382:

But agreements to pay fixed sums plainly without reasonable relation to any probable damage which

may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—"to treat the sum named as liquidated damages".

Conclusion

For the reasons stated, it is respectfully submited that this petition for a writ of certiorari should be granted.

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Attorney for Petitioner.

APPENDIX

Contract Articles of Standard Form, being the material parts of the contract herein:

Article 3. *Changes*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly . . .

Article 9. *Delays—Damages*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes be-

yond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: . . .

Article 16. *Payments to contractors.*—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract.